DEC 19 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the

United States

October Term 1973

No. 73-733

JOHNNIE WILSON and SHIRLEY WIGHT,

Petitioners,

-vs-

UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The Petition for Writ of Certiorari correctly sets forth the opinions below.

JURISDICTION

The Petition correctly states that the jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

The Petitioners present two questions which they ask this Court to answer in the affirmative.

The first one in effect requests this Court to reverse the courts below on the ground that the judgment is in conflict with the law of Montana. The second question is a new one, never before argued or brought up before the courts below — did the courts below err in not considering the post application conduct of the Repondent insofar as waiver and estoppel are concerned.

STATUTES INVOLVED

The pertinent statutes are set forth in the Petition.

STATEMENT OF THE CASE

The statement of the case presented in the Petition is correct for the most part insofar as it goes. However, there are certain key facts which need further elaboration.

The crux of the case are three applications for reinstatement of the insurance policy involved, those dated September 3, 1967, January 8, 1968, and July 1, 1968 (Defendant's exhibits B, C and D), all of which form the basis for the decisions below that the insurance policy was null and void due to the misrepresentations in the said applications.

To summarize the applications for reinstatement, the insured in two of them denied any illness, medical treatment or doctors consulted since the issuance of the insurance policy and the remaining application merely states that the insured had flu for a period of three days in 1967 along with the name of the doctor consulted.

In truth, the insured had been hospitalized for a period of five days from August 30, 1967, through September 3, 1967, for treatment of a situation anxiety reaction and excessive consumption of alcohol and the attending doctor was not even the same one who purportedly treated him for the flu (deposition of M. D. Winter, pp. 5-8). It is interesting to note that on the very date of the first application for reinstatement, September 3, 1967, the insured was released from the hospital following the foregoing treatment for anxiety and excessive consumption of alcohol but the application denies any illness or medical treatment whatsoever.

It is true that at the time the insurance policy was issued, an investigation was made by the Respondent concerning the insured's drinking habits. However, the investigation revealed an irregular drinking habit many years before followed by a voluntary drinking cure by the insured on his own some six years previously with indications that he had not resumed the habit (Tr. pp. 166-168).

GROUNDS FOR DENYING WRIT OF CERTIORARI

1. *Petitioners Have Made No Showing That the Decisions Below Decided An Important or Special State Question in Such a Way as to be In Conflict with Applicable State Law.*

Only two specifications of error were raised by the Petitioners (appellants) in their briefs before the Court of Appeals for the Ninth Circuit (Brief, p. 3). These two specifications of error were that the District Court erred in its Finding of Fact No. 6 and in its Conclusion of Law No. 2.

The foregoing finding of fact and conclusion of law can be summarized as stating that the representations and statements contained in the three applications for reinstatement pertaining to the health of the insured and to the medical treatment, recovery and names of doctors were incomplete and false and constituted misrepresentations and concealment of facts material to the reinstatements of the policy and that the Respondent in good faith would not have reinstated the policy on each occasion if the true facts had been known to it (Petition, Appendix A, pp. 16-17).

The gravamen of Petitioners' argument in the courts below was that under the substantive law of the state of Montana it is necessary for an insurance company to prove a wilful intent to deceive on the part of the applicant for reinstatement in order to void the

policy (Brief, pp. 4, et seq.). Much importance was also placed upon the argument that a difference exists in the cases depending upon whether the statements of the applicant are deemed to be warranties or representations.

Petitioners in their foregoing argument failed to comprehend or point out that the Montana Insurance Code adopted in 1959 did away entirely with the distinction between warranties and representations and the decisions requiring a wilful intent to deceive have been overruled. *American Indemnity Company v. Elespuru,* (D. Mont. 1969) 302 F.Supp. 878.

The two-paragraph decision of the United States Court of Appeals for the Ninth Circuit in this case wasted no words in affirming the judgment of the trial court, using *American Indemnity Co. v. Elespuru, supra,* as authority for holding that the cases on which Petitioners relied were decided on substantially different statutes (Petition, Appendix B, p. 19).

Petitioners in their Petition still rely heavily upon the case of *McLane v. Farmers Insurance Exchange,* (1967) 150 Mont. 116, 432 P.2d 98, as they did in the courts below, as well as the case of *Travelers Insurance Co. v. Wilhelm,* an unreported case decided earlier this year by the United States District Judge who presided at the trial of this case (Petition, pp. 8-12). These cases obviously are based upon facts entirely different from those involved in this case and are of no help as

a basis for Petitioners' argument that the decision below are in conflict with the law of Montana.

Much of the Petition is made up of argument as to the effect of certain evidence (such as the testimony of the agent, Lund), all of which was decided against Petitioners in the courts below, and which add nothing in support of their argument.

There is in fact no conflict between the decisions below and applicable state law and Petitioners for the most part are merely reiterating the same arguments and law as they did below.

2. *Petitioner's Argument Regarding the Post Application Conduct of Respondent, Waiver and Estoppel Was Not Raised Before or Passed Upon by the Court of Appeals Below and Accordingly Should Not Be Considered.*

It is, of course, a long-standing rule that ordinarily issues not raised before nor considered by the Court of Appeals will not be considered by the United States Supreme Court on review. *Adickes v. Kress & Co.*, (1970) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Petitioners complain that the trial court never mentioned waiver, estoppel or the Respondent's post application conduct and that the Court of Appeals did not go into waiver or estoppel (Petition, p. 13).

There is good reason for the failure of the courts below to not pass upon waiver, estoppel and the post application conduct of Respondent. The truth is that these matters were never pleaded or argued in either one

of the courts below, the same being an entirely new approach introduced by the Petition for the first time.

In essence, Petitioners argue that even if an applicant lies about his health and makes fraudulent misrepresentations and concealments of facts, the burden then shifts to the insurer to discover the fraud regardless of the latter's knowledge of the fraud. This obviously is not and should not be the law. 3A Appleman, *Insurance Law & Practice* §2055; 43 *Am.Jur.2d,* Insurance §§1061-1062; *California-Western States Life Ins. Co. v. Feinstein,* (Cal. 1940) 101 P.2d 696.

It is obvious in this case that the Respondent insurer knew nothing of the fraudulent misrepresentations nor did it have any reason to know of them until after the insured's death whereupon it immediately took the necessary investigation and steps to rescind the policy (Tr. pp. 136-159).

It is to be noted that the District Court in its Finding of Fact No. 8 found that immediately after learning the true facts pertaining to the applications for reinstatement the Respondent gave notice to the Petitioners that the reinstatements of the policy were null and void and the policy had been rescinded (Petition, Appendix A, p. 16). The sequence of events following the last application for reinstatement lend additional support for our contention in view of the comparatively short periods of time involved. Thus the last application for reinstatement was dated July 1, 1968, death

of the insured was on September 13, 1968, proof of death was not made to the Respondent until November 15, 1968, and payment was denied and the policy rescinded by the Respondent by letter dated December 18, 1968.

As noted above, the specifications of error argued before the Court of Appeals by Petitioners were restricted to a finding of fact and a conclusion of law dealing only with the fraudulent nature of the misrepresentations and concealment of facts made by the insured in his applications for reinstatement. Matters of the Respondent's post application conduct, waiver and estoppel were never raised before nor considered by the courts below. These matters accordingly should not be considered by this Court.

CONCLUSION

For the reasons presented above it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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